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Children's Socio-economic Rights, Democracy and the Courts

Introduction

Never before has there been such a level of acceptance that children are socio-economic rights-bearers. The UN Convention on the Rights of the Child (CRC) provides children with a wide variety of socio-economic rights and there is a growing recognition that children are also accorded such rights under other international and regional human rights law instruments, as well as domestically. However, the high levels of deprivation experienced by children worldwide demonstrate that these rights have often failed to be effectively vindicated by law- and policy-makers at a domestic level. While the failure to give effect to children's rights may occasionally be attributed to policy choices deliberately aimed at disadvantaging children (or specific groups of children), it is more frequently the product of legislative or executive indifference and inertia in relation to child socio-economic rights issues. In light of the apparent unresponsiveness of the elected branches of government, advocates are increasingly focussing their efforts to secure the vindication of children's socio-economic rights on the judiciary.

Children are disproportionately represented amongst the poor¹ whether such poverty is defined in absolute, relative or other terms.² Furthermore, the increase in inequality between rich and poor in many countries over the past two decades has

¹ UNICEF, *Poverty Reduction Begins with Children* (New York, UNICEF, 2000) 41.

² By 'poverty', I do not simply mean lack of income (as it has traditionally been defined). Rather, I regard poverty as a multidimensional phenomenon that 'encompasses deprivations in areas of health education, participation and security' (S Jahan, *Human Rights-Based Approach to Poverty Reduction: Analytical Linkages, Practical Work and UNDP* (UNDP, 2002). For a discussion of the challenges surrounding the definition of child poverty, as well as of the various methodologies that have been/can be employed, see G Redmond, 'Child Poverty and Child Rights: Edging Towards a Definition' (2008) 14(1) *Journal of Children and Poverty* 63.

been accompanied by a rise in levels of child poverty.³ It is well established that living in poverty does not simply impact on the child's experience during childhood but frequently serves to curtail the opportunities or life chances available to her as an adult.⁴ Indeed, in addition to the moral case for eradicating child poverty, which is founded on the immense human cost of allowing children to grow up suffering physical and psychological deprivations and unable to participate fully in society, society has a strong interest in eradicating child poverty.⁵ This is due to the societal costs (financial or otherwise) that result from it.⁶ Global concern with child poverty is reflected in the way in which efforts to address child disadvantage play a central role in relation to general anti-poverty strategies and efforts to advance human development. This is demonstrated by the fact that one Millennium Development Goal (MDG) is explicitly child-focussed,⁷ and that every single MDG is connected to the well-being of children.⁸ However, the fact that the child-specific Millennium Development Goal 'is commonly regarded as the furthest [MDG] from being achieved' can be interpreted as evidence of the relatively low priority accorded to child poverty issues in practice.⁹

³ See, eg with regard to income poverty in the context of developed countries, OECD, *Growing Unequal: Income Distribution and Poverty in OECD Countries* (Paris, OECD Publishing, 2008), available at

<http://masetto.sourceoecd.org/vl=12314920/cl=35/nw=1/rpsv/ij/oecdthemes/99980045/v2008n10/s1/p1>

⁴ According to the Innocenti Centre, evidence from many countries persistently demonstrates that children who grow up in poverty are more likely to be in poor health, to have learning and behavioural difficulties, to underachieve at school, to become pregnant at too early an age, to have lower skills and aspirations, to be low paid, unemployed and welfare dependent (Innocenti Research Centre, *Child Poverty in Perspective: An Overview of Child Well-being in Rich Countries—A Comprehensive Assessment of the Lives and Well-being of Children and Adolescents in the Economically Advanced Nations* (Florence, UNICEF, 2007) 5).

⁵ See, eg D Hirsh, *Estimating the Costs of Child Poverty* (York, Joseph Rowntree Foundation, 2008).

⁶ Ibid.

⁷ See Millenium Development Goal 4 (reducing child mortality).

⁸ UNICEF, *The State of the World's Children 2006: Invisible and Excluded* (New York, UNICEF, 2006) 5. That is not to say, however, that the realisation of the MDGs, based as they are on national averages, will serve to address the poverty experienced by all children. See *ibid* 3. This point is discussed further in Chapter 2.

⁹ UNICEF, *The State of the World's Children 2005* (New York, UNICEF, 2005) 8. For more, see Chapter 2.

Children's socio-economic rights have been described as a concrete set of responses to specific facets of child poverty.¹⁰ However, as will be argued later in this work, any suggestion that child poverty can be remedied by the law or judicial activity alone would be premised on a simplistic understanding of the causes of poverty as well as on an (almost certainly) exaggerated view of the ability of the judicial enforcement of socio-economic rights to effect wide-ranging social change.¹¹ Nor is poverty simply a violation of socio-economic rights. UNICEF has emphasised that reducing child poverty does not entail simply the fulfilment of children's rights to the goods and services necessary for their survival, normal growth and development; it 'also means improving the opportunities for disadvantaged children to participate in society'.¹² More broadly, there is no doubt that child poverty will not be eliminated simply by legal reform: institutional reform at both the national and supranational levels is equally, if not more, essential.¹³ There is also a need for a general 'change in mentality' towards conceptualising child poverty as a matter of human rights, not simply a question of charity. Judicial enforcement of children's socio-economic rights cannot serve as a panacea for the multiple, complex factors that cause and perpetuate child poverty.¹⁴ However, as this book argues, there is ample evidence that it can operate so as to at least mitigate or alleviate some of them, thereby proving itself a useful tool in combating socio-economic disadvantage experienced by children.

The 2008 credit crisis and the resultant global recession is possibly the single most serious threat posed to the realisation of children's socio-economic rights since the adoption of the CRC and the establishment of the children's rights regime proper. The Independent Expert on Human Rights and Extreme Poverty has observed that 'children are being hit hardest by a crisis that they did not create' and the projected

¹⁰ G Van Bueren, 'Combating Child Poverty: Human Rights Approaches' (1999) 21(33) *Human Rights Quarterly* 680, 681.

¹¹ There is considerable debate surrounding the extent to which judicial enforcement of socio-economic rights will impact upon access to, and distribution of, socio-economic rights-related goods and services (and hence contribute to social change). For an excellent collection of analyses of this issue based on a number of different national experiences, see V Gauri and D Brinks, *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge, Cambridge University Press, 2008). For more on this point, see Chapters 5 and 6.

¹² UNICEF, above n 9, 15.

¹³ For more on the steps necessary to eradicate child poverty, see various contributions to J Doek *et al* (eds), *Child Poverty: African and International Perspectives* (Mortsel, Intersentia, 2009) 3.

¹⁴ For more on the causes of child poverty, see Chapter 6.

long-term impact of the crisis on them is particularly concerning.¹⁵ Governments and international financial institutions have asserted that widespread cuts to socio-economic rights-related programmes and services worldwide are justifiable—indeed unavoidable—if both domestic and global economies are to recover. Corporate bail-outs have arguably come at the cost of children and other vulnerable societal groups. Just as the courts may have something to contribute as a counter-hegemonic force to neo-liberal globalisation¹⁶ which poses a threat to children’s socio-economic rights,¹⁷ they have a role to play in ensuring that the global ‘economic recovery’ does not trample upon and ignore the rights of children. It is thus crucial to consider the circumstances in which the courts can legitimately and effectively enforce children’s rights.

In recent years, there has been a marked increase in the number of constitutions including children’s socio-economic rights. This is consistent with the significant evidence of a growing global tendency towards the express delineation of children’s rights in national constitutions.¹⁸ This trend is undoubtedly attributable to the influence of the CRC and the growing awareness and appreciation of children’s rights at the domestic level that has followed that instrument’s entry into force. Moreover, the increased presence of child-specific socio-economic rights provisions also results from the growing tendency towards the constitutionalisation and adjudication of justiciable economic and social rights at both the national and international levels.

¹⁵ Independent Expert on Human Rights and Extreme Poverty, “‘No green shoots of recovery for the world’s poor’” says UN expert on extreme poverty’, Press Release, 17 October 2009.

¹⁶ For an in-depth discussion of ‘neo-liberal globalisation’ and its impact on the enjoyment of human rights, see P O’Connell, ‘On Reconciling Irreconcilables: Neo-Liberalisation Globalisation and Human Rights’ (2007) 7 *Human Rights Law Review* 483.

¹⁷ For more on the courts as a counter-hegemonic or hegemonic force in the context of globalisation, see M Saffron, ‘Can Constitutional Courts be Counterhegemonic Powers vis-à-vis Neoliberalism? The Case of the Colombian Constitutional Court’ (2007) 5 *Seattle Journal for Social Justice* 533, 533–37. For a discussion of the contrary claim that the judicial enforcement of socio-economic rights entails the defence of conservative positions in favour of hegemonic power, thereby reinforcing the status quo of social domination, see in R Uprimny Yepes, ‘The Enforcement of Social Rights by the Colombian Constitutional Court: Cases and Debates’ in R Gargarella *et al* (eds), *Courts and Social Transformation in New Democracies* (Aldershot, Ashgate, 2006) 127, 138.

¹⁸ For more, see J Tobin, ‘Increasingly Seen and Heard: The Constitutional Recognition of Children’s Rights’ (2005) 21 *South African Journal on Human Rights* 86.

But why focus on these rights in particular? First, children's civil and political rights (particularly those relating to life, exploitation and bodily integrity) were already protected under the pre-'children's rights regime' by, amongst other things, tort, criminal, labour and child protection law.¹⁹ In addition, until quite recently, discussions of civil and political rights dominated academic and legal discourses on rights. As a result, the scope and implications of such rights are generally well-defined (albeit that their application to children may be less so). It is only relatively lately, however, that lawyers have turned their attention to socio-economic rights. The substantive content of such rights and the nature of the obligations they impose thus remain underdeveloped. It is, therefore, fitting to focus on recent judicial attempts to grapple with these rights and to ensure that such rights are given effect to by the state. Furthermore, as the litigation of socio-economic rights becomes ever more common, it seems likely that the courts will grow in confidence and adopt a more assertive stance in relation to their enforcement. This will have a knock-on effect on the balance of power between the courts and other branches of government in relation to issues, such as policy-making and resources allocation, which are currently regarded as very much within the domain of the non-judicial organs.²⁰ It is, thus, timely and appropriate to consider the issues raised by the courts adopting a proactive approach to children's socio-economic rights.

This book centres on the circumstances in which the courts can or should give effect to the constitutional socio-economic rights of children. Having conceptualised children as socio-economic rights-bearers in Chapter 1, it outlines a role for the courts in ensuring the vindication of children's constitutional socio-economic rights where the elected branches of government have not done so. Its main premise is that such judicial activity is justifiable where this is necessary to ensure the realisation of those rights. In doing so, it concentrates to a large extent on the judicial enforcement of the positive obligations imposed by children's socio-economic rights. As discussed in the first chapter, these obligations have been the subject of the greatest debate amongst academics, practitioners and society in general, due to perceptions of them as

¹⁹ There is, however, no question but that many civil and political rights for children are at least as controversial as socio-economic rights. For more, see Chapter 2.

²⁰ For more, see Chapter 4.

necessarily entailing state action, as well as resource allocation and expenditure. Crucially, the judicial enforcement of socio-economic rights-related positive obligations is likely to have far greater implications for status quo power relations and resource allocation than enforcement of their negative counterparts.²¹ This work argues that the courts can, and should, intervene to enforce children's socio-economic rights even where the legislature or the executive may not have envisaged the likelihood, or accepted the desirability, of such judicial involvement. It is asserted that, in doing so, the courts can go so far as to set out the steps that the state must take in order to fulfil such obligations—even where this amounts to controlling the discretion of the elected branches of government with regard to making policy or law. Admittedly, it is arguable that the entire purpose of judicial review or constitutional adjudication is the control of discretion in accordance with the rule of law.²² A significant portion of the book's analysis, however, focuses on where a court exercises control by setting out steps in the form of a mandatory order that the state must take to fulfil its constitutional obligations.

Any claim that the courts can, and should, enforce children's socio-economic rights has to acknowledge and address the challenges posed to such an assertion by liberal democratic constitutional theory. Thus, the first part of the book is devoted to examining the positivistic legitimacy of such judicial activity within a constitutional liberal democracy. Two of the most powerful potential obstacles to the courts intervening to ensure the realisation of children's socio-economic rights are the separation of powers doctrine and what Bickel labelled 'the counter-majoritarian difficulty'.²³ Both of these are underpinned by particular understandings of the respective roles of the elected branches of government and the courts with regard to enforcing rights; in particular, they are premised on presumptions about the appropriateness of particular mechanisms for the resolution of disagreement about

²¹ Indeed, Sunstein has pointed out that the line between positive and negative rights, in current US law, is selected by reference to existing distributions (C Sunstein, *The Partial Constitution* (Cambridge, Cambridge University Press, 1993) 71. The same is true of other jurisdictions such as those considered in this work.

²² See E Palmer, 'Resource Allocation, Welfare Rights: Mapping the Boundaries of Judicial Control in Public Administrative Law' (2001) 20 *Oxford Journal of Legal Studies* 63, 70.

²³ A Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis, Bobbs-Merrill, 1962) 16.

rights, as well as assumptions about the capacity of rights-bearers to employ such mechanisms.

In light of this, Chapter 2 of the book considers the position of children in democracy. It details their relationship with the majoritarian decision-making processes that have traditionally been considered the most apposite mechanism for ensuring socio-economic rights within democratic societies. Focussing on the work of John Hart Ely and Jeremy Waldron on judicial review, Chapter 3 argues that children's 'exclusion' from democracy, and the ineffective representation of their rights/interests by others, results in their failing to enjoy the benefits and protections allegedly accorded to participants in such processes. This weakens the 'counter-majoritarian objection' to the courts giving effect to children's socio-economic rights.

Many of the rights associated with citizenship, including freedom of association and expression, are accorded to children under the CRC.²⁴ This is consistent with that instrument's recognition that children are social or public actors. The omission (or at least the non-inclusion) of the 'right to vote', however, means that children are denied what is arguably the 'keystone' right of citizenship. In her work outlining what she terms the 'semi-citizenship' of children, Cohen observes, 'the most controversial and least attended side of children's citizenship concerns their political rights'.²⁵ However, the existence of political rights and access to decision-making processes associated with democratic citizenship are frequently proffered as justifications for a limited judicial role. Therefore, an element of Chapters 2 and 3 is an exploration of the implications of both the child's position in democracy and the parameters of the children's rights regime for the position of the child as 'democratic citizen'. This entails a consideration of how key concepts and values in democratic theory, such as 'representation' and 'participation', apply with regard to children. Ultimately, an underlying question addressed by the book is how does—or should—the limited democratic 'citizenship' enjoyed by children impact on the parameters of legally legitimate judicial activity aimed at securing the enforcement of their rights?

²⁴ For more on children's civil and political rights under the CRC, see Chapter 2.

²⁵ E Cohen, 'Neither Seen Nor Heard: Children's Citizenship in Contemporary Democracies' (2005) 9(2) *Citizenship Studies* 221, 224.

Chapter 4 centres on the claim that, in seeking to give effect to children's socio-economic rights, the court exercises control over the law and policy-making functions traditionally regarded as allocated to other branches of government, thereby violating the separation of powers doctrine. In it, I discuss the courts' function under the separation of powers in light of their duty to ensure that children's socio-economic rights are upheld by all branches of government. The chapter considers the implications that children's relative powerlessness within democracy has for the judiciary's role as guardian of rights and for the courts' approach to the separation of powers doctrine in the context of adjudicating children's socio-economic rights. In doing so, it contrasts the approach adopted by the South African Constitutional Court and the Irish Supreme Court to the balance to be struck between the separation of powers doctrine and the principle of constitutional supremacy in the context of children's constitutional socio-economic rights adjudication.

Taken together, Chapters 2 to 4 make the case that the courts may give effect to children's socio-economic rights even where such judicial behaviour appears *prima facie* to be undemocratic and results in the courts' exercising control over the discretion of the other organs of government with regard to law or policy-making in violation of a traditional, formal conception of the separation of powers.

It is, of course, not enough to consider the judicial enforcement of children's socio-economic rights solely in terms of the compliance (or not) of such activity with tenets of liberal democratic constitutional theory. If our concern is with securing a greater level of enjoyment of socio-economic rights on the part of children, then a key question to be considered will be: 'does such activity work?' Thus, the second part of the book builds upon the earlier discussion of the legitimacy of the courts giving effect to children's socio-economic rights, focussing on the related issue of the efficacy of such judicial activity in terms of its ability to bring about the desired result of the enforcement or realisation of children's rights. Referencing litigation and court decisions from a range of different jurisdictions, including India, Argentina, Brazil and South Africa, Chapters 5 and 6 address this question. A consideration of efficacy consists of not only an examination of the direct legal, policy and other effects of particular instances of judicial enforcement of children's socio-economic rights. It also involves a discussion of the indirect effects of this activity, where these include a

subsequent change in law, administrative policy or societal attitudes that impacts upon the enforcement of children's socio-economic rights.

Chapter 5 centres on the question of the institutional capacity of the courts in the context of enforcing children's socio-economic rights and addresses the thorny issue of the implementation of court decisions. It identifies a number of elements that increase or diminish the likelihood of success where the courts seek to give effect to children's socio-economic rights. In turn, Chapter 6 centres on the issue of the advantages and drawbacks of employing the law and the courts (as opposed to other avenues or forms of advocacy) to advance children's rights. Consistent with the book's concern with the role of children as social actors and their agency, a key element of this chapter is a consideration of the role played by children in relation to socio-economic rights litigation that is ostensibly taken and made on their behalf, and the extent to which their views affect both the inputs and the outputs of socio-economic rights adjudication. This section of the monograph also addresses the frequently-made claim that in enforcing the socio-economic rights of those children who appear before them, the courts will inevitably negatively impact upon other children's enjoyment of socio-economic rights.

The last chapter draws together the arguments made throughout the book in order to draw final conclusions on the legitimacy and efficacy of the judicial enforcement of children's socio-economic rights.

The jurisprudence discussed in this book emerges from a range of both developed and developing regions.²⁶ Challenges posed to children's socio-economic rights vary greatly between the different jurisdictions but all of the countries chiefly referred to have high levels of child poverty, whether relative, absolute or otherwise

²⁶ According to the Human Development Index, which is employed by the United Nations in categorising countries in terms of human development, the United States ranks 4th, Ireland 5th, Argentina 46th, Brazil 73rd, Colombia 79th, South Africa 110th and India 119th (United Nations Development Programme, *Human Development Report 2010* (Geneva, UNDP, 2010)). The human development index (HDI) is a summary composite index that measures a country's average achievements in three basic aspects of human development: health, knowledge and a decent standard of living. Source: UNDP, 'What is the Human Development Index (HDI)?', <http://hdr.undp.org/en/statistics/faq/question,68,en.html>.

defined in nature.²⁷ It is important to note that this book does not pretend to provide a blow-by-blow comparison of the judicial protection of children's socio-economic rights in the countries primarily referred to, namely, Colombia, Argentina, Ireland, Brazil, South Africa, India and the United States. Nor does it become heavily involved in issues such as the alleged differences between common law, civil law and mixed legal systems or between those jurisdictions that have adopted a monist or dualist approach. Rather, the case law highlighted is employed to provide support for and to flesh out the book's argumentation, which aims to be general and normative rather than jurisdiction-specific. That is not to suggest that there is no consideration of divergent elements of different constitutional frameworks and legal systems; these are addressed where they play a role in guiding the scope of judicial decision-making under discussion. The primary focus, however, is on the jurisprudence, rather than on detailed analyses of general constitutional schema. The crucial unifying elements of all the constitutional regimes discussed in this work is that, first, they are all democracies whose constitutional frameworks afford protection to the socio-economic rights of the child, albeit to a greater or lesser extent.²⁸ Secondly, the courts in those jurisdictions have played an active role (whether positive or negative) in relation to the enforcement of the constitutional socio-economic rights of the child.

²⁷ The Irish Combat Poverty Agency reports that in 2008, according to the EU Survey on Income and Living Conditions (EU-SILC), 6.3% of all children under 17 in Ireland were living in 'consistent poverty' (living in households with an income less than 60% of the median and without access to two or more basic goods) and 18% were 'at risk of poverty' (living in families whose income was below 60% of median income): see www.combatpoverty.ie/povertyinireland/childpoverty.htm. The US National Center for Child Poverty states that, as of 2009, nearly 15 million children in the United States (21% of all children) live in families with incomes below the federal poverty level (US\$22,050 a year for a family of four): see www.nccp.org/topics/childpoverty.html. According to the NGO Plan, in 2005, India had the largest number of poor children of any country, with an estimated 80% of its 400 million children severely deprived (a condition that was not defined in the report), and 60% 'absolutely poor' (a condition characterised by severe deprivation of basic human needs, including food, safe drinking water, sanitation facilities, health, shelter, education and information, depending not only on income but also on access to services) (Plan, *Growing Up in Asia: Plan's Strategic Framework for Fighting Child Poverty in Asia 2005–2015* (Bangkok, Plan, 2005) 7). According to figures calculated by the Economic Commission for Latin America and the Caribbean on the basis of special tabulations of data from national household surveys, 15.6% of children in Colombia in 2010 lived in extreme poverty, with total child poverty standing at 38.5%; 10% of Argentinean children lived in extreme poverty, with a total child poverty level of 28.7%; 14.6% of Brazilian children lived in extreme poverty, while total child poverty stood at 38.3% (cited in E Espindola and M Nieves Rico, 'A Priority Challenge' (2010) 10 *Challenges* 5, 7). Extreme poverty was defined as 'severe deprivations' (ibid 5).

²⁸ While the United States does not afford protection to children's socio-economic rights in the Federal Constitution, this work will consider instances in which state courts have adjudicated education rights provisions set out in state constitutions.

A final theme of this work is a consideration of the way in which the courts have approached children's socio-economic rights cases as 'children's rights' cases. While some adjudicative bodies have displayed a strong consciousness of the position of children as rights-holders in society, others appear to attach only minimal weight to the fact that the rights subject to their decision-making are those of a group with its own socially and biologically determined disadvantages. Thus, key questions underlying the discussion in this monograph include: what perceptions of children as rights-holders and members of democratic society underpin the various judicial approaches considered? How, if at all, do the courts advance particular conceptions of children and children's socio-economic rights through their decision-making?

The book does not argue that the judicial enforcement of children's socio-economic rights is an unqualified 'good'. Rather, it is careful to focus on both the positive aspects and potentially seriously negative implications of such activity in terms of the realisation of children's rights. In doing so, it provides pragmatic, convincing answers to the questions of whether the courts can and should intervene to enforce children's socio-economic rights.